No. 10,378

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MONTGOMERY WARD AND COMPANY

Appellant,

vs.

CHESTER A. LAMBERSON AND LYDIA LAMBERSON

Appellees.

BRIEF OF APPELLEES

Appeal from the District Court of the United States for the District of Idaho, Eastern Division

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Idaho Falls, Idaho.

WALTER H. ANDERSON
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STATEMENT OF FACTS

It is felt by counsel for the appellees that a concise statement of the facts of this case may be of assistance to the Honorable Court. First, in order that it may be fully advised as to the facts of the case, and for the further reason that the appellees do not agree with the short brief statement of the case in appellant's brief. (appellant's brief, p. 2, 3).

On November 26, 1941, Chester A. Lamberson and Lydia Lamberson were husband and wife and had been for many years prior to said date.

In the afternoon of November 26, 1942, at approximately 3:00 P. M., appellee, Lydia Lamberson entered appellant's store from Shoup Avenue through the third door or entrance way from the south in Idaho Falls, Idaho. There

are four entrance ways leading off from Shoup Avenue into appellant's store (Tr. P. 71, 72, 73). Lydia Lamberson entered the third door from the south (Tr. P. 72, 73). When she entered the store, there was no water on the entrance way. It was dry (Tr. P. 74).

Lydia Lamberson went into the store to do some shopping (Tr. P. 72). After being in there for approximately thirty minutes, she left the store using the same door way, that is, the same one she came in through (Tr. P. 73, 74). When she was taking the second step on the outside of the door, and while on the entrance way, she slipped on some water that was on the entrance way and fell and broke her wrist. She saw the water as she went down (Tr. P. 73). She fell near the window (Tr. P. 73). The entrance way to the store commences at the easterly edge of the sidewalk and leads into the store a distance of seven feet, and after she fell, her feet were approximately eighteen inches from the sidewalk as she laid on the entrance way. After she fell, she became very sick and experienced excruciating pain and was nauseated (Tr. P. 74). The hose on her right leg was wet above the ankle from the water on the entrance way. After falling and while still on the entrance way, someone came to the store door from the inside and asked her if she had fallen. She told him she had and was injured. He then took her back to the manager of the store and said, "Here is a lady who fell in the entrance and she thinks she has a broken arm" (Tr. P. 74).

She was taken into the store and given a drink of cold water by employees at the store who also applied cold water to her face and forehead (Tr. P. 75). After being in the store

approximately thirty minutes, she was taken in a taxicab to the office of Dr. Soderquist, of Idaho Falls, Idaho, who made an x-ray of the fractured arm, and it was while at the office of the doctor that her husband came to see her. The doctor applied a cast to her arm (Tr. P. 77, 78).

After leaving the doctor's office, she was taken to her home where she remained in bed for two weeks and after two weeks she was up and about the house, but did not do any work for three and one-half months (Tr. P. 78, 79). In addition to the broken wrist bone at the time of her falling, the plaintiff injured her back and ankle (Tr. P. 80). Prior to her injury, she was a cosmetic saleswoman, and her earnings amounted to about $60.00 per month (Tr. P. 79).

After the cast was removed from her arm, she had a deformity in her wrist and limitation of motion and limitation of use in her wrist and arm, and she still suffers pain, limitation of motion, and deformity in her right wrist (Tr. P. 79, 80). She is unable to perform any housework that requires her to use grip or exert strength in her left hand (Tr. P. 80). Defendant's medical expert, Dr. C. M. Cline, admitted an injury of this type to be very painful (Tr. P. 124). And that there was a permanent loss of flexibility and mobility in the wrist and fingers of approximately twenty-five percent (Tr. P. 121, 122, 123). Said expert further testified that the same deformity existed in the wrist at the time of the trial as existed on June 24, 1942, when this expert examined Mrs. Lamberson by agreement of counsel (Tr. P. 121, 122). Further defendant's medical expert testified that one could have a severe fracture and an arthritic condition following,

that never existed before the fracture (Tr. P. 125). And that from this expert's examination, Mrs. Lamberson had sustained a definite fracture of a bone in the right forearm close to the wrist joint Tr. P. 127).

There is definite evidence that the entrance way was dry when Mrs. Lamberson entered appellant's store (Tr. P. 73, 85, 86). There was no snow on the sidewalk in front of the entrance way to the store (Tr. P. 87).

There is definite evidence from at least two disinterested witnesses who entered Montgomery Wards Store on the same day, and through the same entrance that Mrs. Lamberson was injured on, not more than a few minutes after Mrs. Lamberson fell, that water was being swept out of the same entrance way. The weather of the afternoon of the accident was fair and the sun was shining brightly. These two witnesses, Mrs. Ethyl Criddle and Lydia Webb Thuesen, and it is to be recalled that Mrs. Lamberson entered the store about 3:00 P. M. (Tr. P. 73) and remained in the store about thirty minutes, these witnesses entered the store sometime between 3:30 and 4:00 P. M. (Tr. P. 102, 103, 114). And at this time, which could only be a few minutes after Mrs. Lamberson was injured, both witnesses, Criddle and Thuesen, stopped on the sidewalk while the employee was sweeping water out of the entrance way as they went in (Tr. P. 103). "Q. I asked what the fact was as to whether you saw water in the entrance way when you went in the store. Did you see any water in the entrance way as you went in? A. We had to kind of stop on account of a man sweeping there" (Tr. P. 103, 114). "Q. When you and Mrs. Criddle went into the store,

did you have an difficulty getting in? A. We had to kind of stop so as not to get the water splashed on us. Q. Can you fix the time it was exactly? A. No, Sir, I can't. Q. Can you tell whether it was before or after Mrs. Lamberson fell? A. Yes, Sir, it was after" (103, 114, 116). There was quite a bit of water in the entrance way at this time, (Tr. P. 117) right in front of the door (Tr. P. 117).

At the time this accident occurred, Montgomery Ward and Company occupied all of the ground floor (Tr. P. 110). There was no rubber matting on the tile in the entrance way at the time this accident occurred about 3:30 in the afternoon (Tr. P. 85). Mrs. Lamberson saw the water in the entrance way (Tr. P. 85). She got her coat and clothing wet when she fell Tr. P. 85). The entrance way where the accident occurred has a rise in it or slopes one-seventh of an inch to every twelve inches (Tr. P. 133). Appellant's witness Miller admitted that there was no rubber matting, or sand, or ashes on the tile entrance way when this occurred (Tr. P. 134). And also that he did not know whether or not the entrance way at the point where the accident occurred was wet or dry at the time Mrs. Lamberson was injured (Tr. P. 138).

After counsel for defendant appellant moved to strike the testimony of witnesses Thuesen and Criddle, he brought out on cross examination the following: "Q. When you went in what was the condition of the entrance? A. Quite a bit of water on there. Q. Over the whole area? A. Right in front of the door was all. Q. There was someone sweeping it out, you say? A. Yes, Sir. Q. Can you say whether that was before

or after Mrs. Lamberson fell? A. It was after according to the time she was there" (Tr. 117, 118). Defendant appellant's expert testified reagarding Mrs. Lamberson's injury as follows: "Q. When you examined Mrs. Lamberson on the 24th of June, 1942, please state what you found relative to Mrs. Lamberson's physical condition. A. She gave me a history on November 26th of slipping and falling at the entrance of the Montgomery Ward Store, and that she had injured her right arm, back at that time. A fracture of the distal end of the radius, the styloid process. We x-rayed this arm at that time and found the position excellent. She said also that her back was strained, but now recovered. She had some swelling in that wrist joint; some limitation of motion; also unable to completely flex the fingers; some deformity at the wrist; was nervous for three months after the injury; tonsils out; teeth bad; throat negative; heart negative; blood 120 over 80; reflexes negative; back normal; some arthritic changes in the hands and wrist joints in both joints; urinalysis made." Further "A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the existence of arthritic changes are about the same" (Tr. P. 121, 122). Further "Q. What I had in mind, Doctor, was how close to the end of the radius where it joints the wrist bone was the fracture? A. Very close. Q. Isn't it true that frequently where you have a fracture so close to the joint that a thickening of the synovial membrane causes stiffness of the joint? A. Very often (Tr. P. 124). Q. If Mrs. Lamberson never had any pain or suffering from pain until after this

fracture, isn't it your opinion that the fracture would be the inciting cause of her pain? A. Yes. I questioned her, however, and she did give some prior history of arthritis (Tr. P. 125). Q. Thickening of the joints, or membrane would cause pain and loss of mobility? A. Yes, Sir" (Tr. P. 126). Defendant's witness, G. W. Miller, store manager for Montgomery Ward and Company at the time this occurred, testified: "Q. Did you inquire how she happened to sustain this injury? A. I don't remember whether I did or not (Tr. P. 129). Q. Subsequent to that time, what did you do relative to examining the premises? A. Well,..... Q. I mean particularly at the entrance. A. Mrs. Lamberson had left the store when I went and got one of my assistants, Mr. Molen, and I asked Mr. Molen to accompany me to the vestibule to see the condition of the place where she claims she fell. I got another man, Mr. Tracy, who picked up Mrs. Lamberson. We examined the vestibule and it was perfectly dry, as far as the vestibule was concerned, but the sidewalk was wet. It was thawing. We had our janitor clean off the sidewalk several times using a broom" (Tr. P. 130, 131). Quare. If the manager of the store did not inquire how Mrs. Lamberson was injured, it seems strange that he would immediately make an examination of the vestibule leading into the store. "Q. At the time that Mrs. Lamberson was injured, was there any rubber matting, sand, or ashes on this tile? A. No, Sir" (Tr. P. 134-135).

Mrs. Lamberson denied having told Dr. Cline anything about ever having had arthritis. "Q. Directing your attention to June 24, 1942, when you went up and was examined by Dr. Cline, what was the fact as to whether you told him any-

thing about having an arthritic condition, or arthritis? A. I never told him anything" (Tr. P. 151).

This case came on for trial before the Honorable William Healy, Circuit Court Judge, sitting at the October, 1942 term, on October 15, 1942, without the intervention of a jury; defendant having demanded trial before the Court sitting without a jury (Tr. P. 20).

On October 20, 1942, the Court filed its opinion and on October 28, 1942, Judgment was filed in the sum of $1,945, lawful money of the United States of America, and costs in the sum of $36.00.

Hence appellant's appeal to this Honorable Court.

AGUMENT

I.

(We will refer to the parties with respect to the position they occupied in the court below, and that is, as "Plaintiff" and "Defendant".) Under this point we will attempt to answer Argument I (Page 7, Appellant's Brief.)

We do not understand how appellant can take the position that the Idaho law, with reference to pleading and practice, controls in this case. It is difficult for us to understand appellant's position. It will be noted that throughout, nothing but Idaho cases are cited. Our understanding is that when the Congress authorized the Supreme Court of the United States to promulgate the rules of practice, that that was the exclusive rule in the Federal Courts, and it is difficult for us to follow counsel in the position they take that the Idaho statutes and decisions control the rules of procedure in the Federal Courts. Rule I. provides that "The Federal rules shall govern the procedure in the District Courts." These rules have the force and effect of Federal statutes.

> John R. Alley & Co. vs. Federal National Bank of Shawnee, 124 F. 2d 995.

The Act of Congress itself provides that, "The Supreme Court of the United States shall have the power to prescribe, by Federal rules, for the District Courts of the United States * * *, the forms of process, returns, pleadings, and motions, and the practice and procedure in civil actions at law." Act, June 19, 1934, Chap. 651.

We invite the Court's attention to Form No. 9 prescribed by the Supreme Court of the United States. Then aside from all of that, we invite the Court's attention to the Bill of Particulars supplied (Tr. P. 14). We deem it wholly unnecessary to take up any more of the Court's time in dealing with the proposition that is so utterly unfounded.

II.

Passing to the Point No. II (Appellant's Brief, page 10) it is there stated that the defendant is not liable because it had no actual knowledge of the existence of the dangerous condition upon its premises, or should have known of the existence by the elapse of reasonable length of time.

First, it is clear from the reading of the record in this case and the evidence of the witnesses, Criddle and Theusen (Tr. page 101 et seq.) that this water was put on this entrance by some employee of the defendant after Mrs. Lamberson entered the store and before she came out, and it is an elementary proposition of law, and it would seem that there could be no dispute about it, that negligence may be proved by circumstantial evidence to the same extent as any other issue in a civil or criminal case might be proved. All of the circumstances here clearly point to the fact that this water was put on this entrance by some employee of the defendant. Then the defendant was charged with notice of its presence there. It was an act of negligence within and of itself to put the water there, and not put sand or ashes or some other substance or give warning to prevent it from becoming a snare and trap.

Nobody contends that a store owner or other proprietor of a business establishment where the public is invited, is insurer, but the liability is predicated upon negligence; Circuit Judge Healey, sitting without a jury, found negligence here and in which he is amply sustained by the evidence.

Now, as to the knowledge of the presence of this water, of course, our contention is that the defendant negligently put it there; and in this connection, we invite the Court's attention to the case of Sears Roebuck & Company vs. Peterson, 76 F. 2nd 243, wherein it is said:

> "But it is urged by defendant that there was no proof that defendant had knowledge of the presence of the twine upon the floor, or that it had been upon the floor for such a length of time as to charge it with constructive knowledge. This is not a case in which the condition was attributable either to the elements or the acts of some third party. The negligence here complained of was that of the defendant itself, committed, it is true by its employee. It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act, or ommission of the owner of the premises it is universally held that the owner of the premises is charged with notice of any structural defect in his property, on the theory that one must be charged with notice of his own act, and hence, whenever defective conditions are due to the direct act of the defendant or of persons whose acts are constructively his own, no notice need be shown but is necessarily implied."

The Supreme Court of California held:

> "Where dangerous or defective condition of property

which causes injury to invitee has been created by negligence of the owner or his employee acting within the scope of the employment, owner cannot assert that he had no notice or knowledge of such condition, but knowledge is imputed to him."

Hatfield vs. Levy Bros. 117 Pac. 2d 841_____ Cal._____.

In Hatfield vs. Levy Bros., in course of the opinion it was said:

"Defendants urge that there is not sufficient evidence to establish that defendants had notice, actual or constructive, of the dangerous condition of the floor and that therefore the judgment must be reversed. There are several reasons why that contention cannot prevail. There is evidence heretofore referred to by defendant Scott, the employee who spread the wax on the floor, that after it was applied on the morning of the accident, the floor was slippery. He thus knew it was slippery and, therefore, dangerous; his negligence had brought about the condition. Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances, knowledge thereof is imputed to him. Saunders vs. A. M. Williams & Co., 155 Or. 1, 62 P. 2nd 260. Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the

owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care, to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it."

Again it has been held:

"Where the slippery condition of the floor is caused by oiling or washing done by defendant, then knowledge of the slippery condition is imputed to defendant, since the jury may properly infer that the condition resulted from the defendant's own act. Busby vs. Southwestern Bell Telephone Co., supra. In that case plaintiff was an employee to whom defendant owned the duty of reasonable care, and while she was on her way to a restroom downstairs, her foot slipped or turned back under her so that she fell while descending the stairs. One of the allegations of negligence was that the steps were wet and slippery from recent washing, and the defendant claimed that in the absence of evidence that it had knowledge of the wet condition of the steps, a verdict for plaintiff could not be sustained. The court affirmed the giving of an instruction omitting this requirement."

Saunders vs. A. M. Williams & Co., 62 P. 2d 260 at page 265; 155 Ore. 1.

Now, then, what are the facts which these unquestioned and unquestionable principles of law apply to and govern in this case. They are, that when Mrs. Lamberson went through the entry way where she was injured, it was dry. It is not disputed that when she came out, it was wet (Tr. pp. 73, 74).

It is clear that between the time she went in and came out, some employee of the defendant put some water on this ramp to wash it. We submit that no other inference is permissible under this case. Then having done so, it became the duty of the defendant and its employees to warn Mrs. Lamberson of that condition. This duty they did not perform. The failure of this duty is negligence. It is true that no eye witness saw this water put on, but all of the circumstances surrounding the entire transaction unerringly point in that direction. We know that the plaintiff went over a dry ramp going in she came out and fell on a wet one. Then it is clear from the evidence of the witnesses, Criddle and Theusen, that after she had fallen, some employee of the defendant began sweeping up the water. This was an inference for the Trial Court to draw, and Judge Healey performed that function.

Would counsel have us believe that some trespasser or some interloper went up to the entry way of Montgomery Ward & Company and put water on it then sweep it out? The law is clear that negligence in these cases may be proved circumstantially. That is so held in Sears Roebuck & Company vs. Peterson, supra; Hatfield vs. Levy Bros., supra.

The court, in Sears Roebuck & Company vs. Peterson, said, "In the instant case there is little room for the speculation that some third party might have placed this twine where it was found. All of the proven circumstances are inconsistent with such a conclusion." 76 F. 2d 247, Syl. No. 7 in opinion.

If some employee of the defendant put this water on this entrance, then no notice to the defendant was required because the knowledge of the employee who put the water thereon

is imputed to the defendant. "Where slippery condition of floor causing injury to invitee is produced by an agent or servant of invitor, no notice of danger need be brought home to invitor to render it liable for injuries sustained by invitee." Westbrook vs. Onondaga Company, 36 N.Y.S. 2d 494.

See also, Philips vs. Montgomery Ward & Co. 125 F. 2d. 248;

Nicola vs. Pacific Gas & Electric Company, 123 Pac. (2d) 529 Cal. Appeals 2d;

Lorenz vs. Santa Monica City High School District, 124 Pac. 2d 846 Cal. Appeals 2d;

Kellogg vs. H. D. Lee Mercantile Supply Company, 160 S. W. 2d 838 Mo. Appeals;

Hinds vs. Wheadon, 121 Pac. 2d 724 Cal. 2d;

Safeway Stores vs. Whitehead, 125 Pac. 2d 194, Okla.;

Parker vs. Jordan Marsh Company, 37 N. E. 2d 465, Mass.;

Marano vs. Jensen, 29 N.Y.S. 2d 346.

Wherein it is held, "The plaintiff was entitled to recover for accident resulting from slippery condition of vestibule in defendant's premises caused by tracking in of snow and slush by people visiting defendant's house."

See also, Clapper vs. Zubres, 24 N.Y.S. 2d 377; 261 App. Div. 850.

So it is seen that all there was in this case was a question of fact and the learned Circuit Judge who sat in the Trial Court has decided that question, and it is submitted that this court will not distrurb the finding.

We urge upon the court to bear in mind that the Trial Judge heard this evidence, saw all of the witnesses, and made his findings of fact and conclusions of law. We doubt that it is necessary for us to point out any of the rules of law pertaining to findings, but we do so in order that we may discharge that full measure of duty that we owe to our clients. In this connection we beg the indulgence of the court to allow us to urge that findings will not be disturbed on appeal if they are supported by sufficient evidence. That this Honorable Court will not weight the evidence, but must accept the findings made by the Trial Court unless no reasonable man could draw the conclusions that the Trial Court did from the evidence.

Occidental Life Insurance Co., vs. Thomas. 107 F. 2d 876.

Under the Federal rules a finding of fact cannot be set aside unless it is "clearly erroneous" in that it is against the clear weight of the evidence.

United States vs. State Street Trust Company, 124 F. 2d 948;

Fidelity & Deposit Company of Maryland vs.

Aberdeen National Bank & Trust Company, 124 F. (2d) 973;

Wittmayer vs. United States, 118 F. 2d 808;

Andrew Jergens Co. vs. Conner, 125 F. 2d 686;

McIntosh vs. Wiggins, 123 F. (2d) 316;

Corbett vs. Halliwell, 123 F. (2d) 331;

Walker vs. Lightfoot, 124 F. (2d) 3.

Gates vs. General Casualty Company of Am. 120 Fed. (2) 925, 927. We quote:

"Appellant's contend that the Court's finding of misrepresentation and concealment is not sustained by the evidence. On this issue, appellants must show the Court findings 'are clearly erroneous', due regard being given to the opportunity of the trial Court to judge of the credibility of witnesses, all but one of whom was heard by the Court." See also:

Gary Theater Company vs. Columbia Pictures Corporation (7th Cir.) 120 Fed. (2) 891.

"There is sharp conflict in the evidence; and of course it is not encumbent upon this Court to reconcile such conflict or to weight evidence; our sole duty is to determine whether there is any substantial evidence to support the findings of the Court below." This from the opinion in:

Babbitt Brothers Trading Company vs. New Home

Sewing Machine Company 62 Fed. (2) 530, 533.

Gray vs. United States, (8th Cir.) 109 Fed. (2) 728;

Southern Railway—Carolina Division vs. Bennett 233 U. S. 80; 58 L. Ed. 860, 34 S. Ct. 566.

"The contention that the verdicts are against the weight of the evidence cannot be considered, as this Court can go no further than to determine whether there is substantial evidence to support them. Nor is it the providence of this Court to determine whether the verdicts are excessive. That question lay with the Court below upon the motion for a new trial." trial." Quoted from:

Grand Trunk Western Railway Company vs. Heatlie 48 Fed. (2) 759.

III.

As to whether or not the plaintiff, Lydia Lamberson, was guilty of contributory negligence was purely a question for the Trial Court and is not a question of law at all. The rule of law in the State of Idaho is that contributory negligence is generally a question of fact for a jury, or judge trying a case without a jury, and becomes one of law warranting non-suit only when the plaintiff's evidence is reasonably susceptible of no other interpretation than that his conduct contributed to

his injury and that he did not act as a reasonably prudent person should have under the circumstances.

Donovan vs. Boise City, 171 Pac. 670; 31 Idaho 324.

Again the Supreme Court of Idaho held that a person injured will not be precluded from recovery because of contributory negligence unless it was such that upon consideration of all facts and circumstances as they appeared at the time in question, a reasonably prudent person would not have acted as did the injured party, and only when it appears upon the undisputed facts that a reasonably prudent person would have acted differently does contributory negligence become a question of law.

Osier vs. The Consumer's Company 41 Ida. 268 239 Pac. 735.

Whether an invitee, walking into elevator shaft was within invitation and guilty of contributory negligence held a question for the jury:

Williamson vs. Neitzel 45 Ida. 39; 260 Pac. 735.

In the case at bar, the plaintiff walked over the same entrance way and entered defendant's store through the door out of which she was leaving, being a short time before she was injured. After transacting the business in the store, doing shopping, she attempted to leave by the same door through which she had theretofore entered. When she went into the store, the ramp or entrance way was dry. When she came out, a matter of thirty to forty minutes later, the ramp or entrance

way was wet. Just how can it be said that she was guilty of contributory negligence?

See:

Bennett vs. Deaton 68 Pac. (2) 895, 57 Ida. 752; Adkins vs. Zalasky 81 Pac. (2) 1090, 59 Ida. 292;

Baldwin vs. Mittry 102 Pac. (2) 643, 61 Ida. 427;

Mere lapse of memory or forgetfulness is not contributory negligence as a matter of law:

MacKenna vs. Grunbaum 33 Ida. 46, 190 Pac. 919;

Davis vs. Pacific Power Company 40 Pac. 950, 107 Cal. 563, 48 Am. St. Rep. 156;

Flack vs. Fikes 267 Pac. 1907, 204 Cal. 329;

Adkins vs. Zalasky, Supra.

Griffin vs. City of Lewiston 6 Ida. 231, 55 Pac. 545.

There can be no contributory negligence without preceeding or concurring negligence on the part of the other party.

Rogers vs. Davis 228 Pac. 330, 39 Ida. 209.

Defendant attempts to explain the existance of the water upon the entrance way by reason of snow accumulating upon the awnings and dropping upon the ramp during the thaw,

or that the water was due to a patch of snow that had fallen from the box that protected the awning to the sidewalk, around the corner of the window where plaintiff had fallen, (defendant's brief p. 17, middle paragraph; also defendant's brief P. 24, at the bottom of the page).

Let us examine the evidence as to this matter.

From defendant's own witness, G. W. Miller, (Tr. P. 131) we quote, "Q. Was there any snow on the sidewalk? A. No snow visible with the exception of one place, a small patch around the corner of the window where Mrs. Lamberson fell that had fallen off the eaves. It was a new patch of snow, probably one foot square and no one had stepped in it, we noticed that particularly. Q. Had this splashed into the vestibule? A. No, Sir, it was south of the vestibule. Q. How far south? A. A good two feet. We have a small box built over the awning to protect the awning when it is rolled up. That box had the snow on and when it thawed, that snow fell off. We had our man out to clean the sidewalk several times that day."

This, then, would seem to eliminate entirely defendant's contention that Mrs. Lamberson slipped in the snow. The snow was on the sidewalk and Mrs. Lamberson fell in the ramp or entrance way that was enclosed from three sides. And from the above testimony of defendant's own witness, the snow had not been stepped in.

Discussing defendant's point 5 appellant's brief PP 39)

Point 1 and we quote (1) "The plaintiff did not produce any expert medical testimony in support of permanent injuries . . . " Let us see from an examination of the testimony produced in this matter whether there was any evidence as to permanent injury or not. And we quote from defendant's medical expert ". . . she has some swelling in that wrist joint, some limitation of motion, also unable to completely flex the fingers. Some deformity at the wrist," (Tr. p. 122).

"Q. What flexibility is in the wrist and fingers?

A. About 75%. The fingers are better than that.

Q. Would you say that if she didn't have arthritis, that she would have full mobility in her wrist and fingers?

A. I cannot answer that positively. I think arthritis is a definite factor," (Tr. P. 123).

Q. "And further, Doctor, will you look at her arm and wrist?

A. You mean examine her arm now?

Q. Yes.

A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the evidence of arthritic changes are about the same," (Tr. p. 122).

Q. This condition existing in Mrs. Lamberson's wrist, isn't it possible that this injury led to all this trouble?

A. I would say that if she had prior arthritis, that this injury might create a more severe condition.

Q. Is it true that one could have a fracture and an arthritic condition follow that they had never had before?

A. Yes, I think that is pretty far-fetched, but I think anything could happen and be true in connection with a fracture.

The plaintiff Mrs. Lamberson, regarding this injury testified:

Q. Is the right wrist as strong as it was before?

A. No sir, it is very, very poor, I cannot peel vegetables even now.

Q. Do you have as much grip as you had before you were hurt?

A. No sir, I haven't.

Q. Prior to the time you were injured was the wrist deformed or straight?

A. It was straight.

Q. Since your injury what is the condition?

A. I have a badly deformed arm.

Q. Prior to the time you were injured were you able to do your housework?

A. All my life I did my own work. I never had a hired girl more than ten days.

Q. What is the fact as to whether you suffer any pain in the right wrist at this time?

A. I suffer all the time.

Q. And what is the fact as to whether you suffered any pain in the right wrist prior to the time you hurt it?

A. I never did.

Q. And do you have pain now?

A. I have not been free from pain since I broke it. I still suffer pain.

It is to be remembered that the plaintiff Mrs. Lamberson denied giving Dr. Cline any history of having suffered from an arthritic condition, (Tr. P. 151).

Opinion evidence by an expert, can never destroy a question of fact, and opinion evidence is not binding upon a trier of facts. As to whether opinion evidence will be accepted or rejected is for the trier of facts.

Evans vs. Cavanagh, 73 Pac. (2) 83, 58 Ida. 324;

Ninstad vs. Wenton Lbr. Co. 99 Pac. (2) 52, 61 Ida. 1;

So. Pac. Co. vs. City of Los Angeles, 55 Pac. (2) 847, 5 Cal. (2) 545;

20 Am. Jur. 1059, Sec. 1208;

Anderson vs. B&O Ry. Co., 96 Fed. (2) 796;

10 C. J. 972, Sec. 228;

22 C. J. 728;

The Supreme Court of the United States, in dealing with opinion evidence generally, speaking through Mr. Justice Cardoza said:

> "But plainly opinions thus offered, even if entitled to some weight have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally whether addressed to a jury (citing authorities) or to a judge (citing authorities) or to a statutory board."

Dayton Power & Light Co. vs. Public Utilities Commission 292 U. S. 290: 54 S. Ct. 647; 78 L. Ed. 1267.

See also:

10 Cal. Jur. 972.

Counsel for the defendant have cited to this Court in their brief (page 43) the case of Jones vs. City of Caldwell 20 Ida. 5, 116 Pac. 110. And from that case we quote:

> "The action of the court in refusing to give the following instruction requested by the plaintiff is assigned as error: 'If you find from the evidence that the plaintiff was caused to fall by a defect in the side-

> walk negligently permitted to exist by the defendant, the defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which plaintiff then was at the time of such fall, and it is no defense that such injury may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more serious to her than they would have been to a person in robust health.' That instruction contains a correct statement of the law upon the subject there involved, and upon the evidence introduced on the trial the instruction should have been given. A person or corporation has no more right to negligently inflict injuries upon a sick person that upon a well person, and the existence of latent disease brought into activity by a fall or other injury would not constitute a defense to an action recover damages for such injuries.' '
>
> Jones vs. City of Caldwell, supra.

It is not in any degree admitted by the plaintiff that she was suffering from, or was afflicted with, any latent disease, such as arthritis, and to the contrary is by her denied. But due to the many cases cited by the defendant, none of which are in point supporting defendant's position, counsel for plaintiff felt it their duty to discuss this point briefly with this Honorable Court.

In view of the above evidence, testimony that was before the Court in this case, at the time of the trial, which the trier of facts saw and heard, the statements of counsel for the defendant commencing (Appellant's brief page 39) to the end of the brief, does not seem to be supported either by the testi-

mony in the case at bar, and certainly not by the law that appellant cites in their brief.

It would not require any expert to detect a deformed, badly bent arm and wrist. Mrs. Lamberson displayed her injured arm to the court, during the trial, without objection, (Tr. P. 80) and the deformity of the arm, and loss of 25% in the wrist and arm were testified to by appellant's medical expert, Dr. Cline. And Mrs. Lamberson testified as to the pain she had undergone since the moment of injury, and was still suffering at the time of the trial. And a bill for medical treatment in the amount of $45.00, (Tr. P. 96). And Dr. Cline further testified that if she had not suffered any pain before the fracture, that the fracture would be the inciting cause of pain (Tr. pp 121 et seq).

We most earnestly submit that appellant's contention that the Trial Court was in error in fixing the amount of recovery, in the manner that he did, is utterly without merit and that the cases cited by appellant's counsel in support of their contention are not in point and do not support the the contention of counsel for which they are cited.

We feel confident that this Honorable Court will bear in mind that there was no request of any kind made to the Court that itemized findings of damages be made. And further in appellant's motion for a new trial (Tr. pp 34 et seq) it did not assign as error the failure of the Court to itemize its findings of damages, or segregation of one portion from the other. The first appallee hears of this alleged error, and the first time

that it is raised is before this Honorable Court, appellant's brief page 39.

That appellees judgment should in all things be affirmed, for which the foregoing is most respectfully submitted.

Dated at Pocatello, Idaho June 6, A.D., 1943.

WILLIAM H. HOLDEN,
Residing at Idaho Falls, Idaho.

WALTER H. ANDERSON

CLYDE BOWEN
Residing at Pocatello, Idaho.

Attorneys for Appellees.